

# OFFICE OF THE ATTORNEY GENERAL

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Honorable Frank McGill  
Probate Judge of Covington County  
P. O. Drawer 789  
Andalusia, AL 36420

Probate Judges -- Mortgage Tax  
-- Recordation of Documents --  
Filing Tax

Mortgage tax due on filing mortgage in probate office given as additional security for same indebtedness secured by a UCC financing statement previously filed in office of Secretary of State covering different collateral and no instrument having been previously filed in a probate office since no mortgage tax was previously paid thereon.

Dear Judge McGill:

You requested an opinion of this office concerning mortgage tax based upon a set of facts furnished to you from a local attorney. The facts presented to you are confusing and are not adequately disclosed as to necessary details. However, for purposes of this opinion the following facts and assumptions are set forth:

(1) Various parties are purchasing the assets of Danley Furniture Stores.

(2) WCK Enterprises (a partnership) purchased certain real estate in Covington County owned by Danley Furniture for approximately \$435,000. A loan was obtained by WCK

Enterprises in the amount of \$395,000 from Colonial Bank of Montgomery. It is assumed that WCK Enterprises gave a purchase money mortgage to Colonial Bank which said mortgage was duly recorded and mortgage tax paid thereon by Colonial Bank.

(3) WCK, Inc. purchased certain furniture, fixtures, inventory and accounts giving a \$3,000,000.00 promissory note to Danley Furniture. A security agreement was executed between the parties and a UCC financing statement was filed in the office of the Secretary of State to perfect a security interest in the property. It is assumed that no UCC financing statement was filed in any probate office of any county. Consequently, no mortgage tax was paid upon the \$3,000,000.00 since no tax is due when filed with the Secretary of State.

(4) As additional security for the \$3,000,000.00 note from WCK, Inc. to Danley Furniture, WCK Enterprises gave a second mortgage to Danley Furniture giving as collateral the real estate in Covington County which was also subject to the Colonial Bank mortgage in the amount of \$395,000.00.

It appears that WCK Enterprises is attempting to guarantee the \$3,000,000.00 debt of WCK, Inc. to Danley Furniture. The question submitted is whether mortgage tax is due upon the recordation of the second mortgage given as additional security for the \$3,000,000.00 promissory note.

It was suggested that mortgage tax should be limited to the difference between the value of the Covington County property (\$435,000.00) and the first mortgage on the property (\$395,000.00) or \$40,000. This is incorrect. Mortgage tax is based upon the indebtedness incurred. The value of the property involved has absolutely no relevance for mortgage tax purposes. Rather, it is a question of whether mortgage tax should be paid upon the \$3,000,000.00 for which the second mortgage was given as additional security. The value of the collateral given in the second mortgage is not relevant.

In accordance with Section 40-22-2, Code of Alabama 1975 (1985 Supp.), mortgage tax is due upon any instruments recorded in the probate offices of Alabama which evidence the securing of an indebtedness. However, paragraph (4) of Section 40-22-2 states as follows:

The privilege taxes herein imposed shall not be required on or for the filing of any such

instrument, providing additional or substitute security for any indebtedness secured by, or the securing of which is evidenced by, an instrument previously filed, upon the filing of which the taxes provided by law have been paid or which was filed at a time when no such privilege taxes were required by law; provided, that the secured indebtedness remains unchanged in amount and in time of maturity. [Emphasis supplied]

From the facts and assumptions set forth above, since the UCC financing statement based upon the security agreement given by WCK, Inc. for the \$3,000,000.00 promissory note was filed with the Secretary of State, no mortgage tax was paid upon the \$3,000,000.00. The second mortgage given as additional security for the \$3,000,000.00 promissory note is presumably to be recorded in the probate office of Covington County. Therefore, mortgage tax will be due at that time based upon the \$3,000,000.00 promissory note. The facts submitted to you state that the note is in excess of \$3,000,000.00. Mortgage tax is based upon the amount of indebtedness recited in the note even though the real estate mortgage does not state the exact amount of the note.

I trust that the above sufficiently answers your inquiry. Please do not hesitate to call if this office can be of further assistance in this matter.

Sincerely,

CHARLES A. GRADDICK  
Attorney General  
By-

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CAG:CEC/ccc